No. 42430-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

JEROME C. PENDER,

PETITIONER.

(CORRECTED) PERSONAL RESTRAINT PETITION

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A. IDENTITY OF PETITIONER

Jerome C. Pender (hereinafter "Pender"), Petitioner attacks his judgment for Attempted Murder in the First Degree with a deadly weapon enhancement (Thurston County Case No. 07-1-00886-5). Mr. Pender (DOC #320567) is currently imprisoned at Clallam Bay Correctional Center, serving a 300 month sentence. This is Pender's first collateral attack on this judgment of conviction.

B. FACTS

Procedural History

On May 18, 2007, the State filed an Information charging Pender with attempted murder. Pender was twice tried by a jury. The first jury hung on November 30, 2007. Pender was appointed new counsel for the second trial. The second jury convicted Pender of attempted murder and a firearm enhancement on July 3, 2008. Pender was sentenced on July 17, 2008. A copy of his judgment is attached as Appendix A.

Pender appealed. His conviction and sentence were affirmed by this court. The Washington Supreme Court denied further review. A mandate was issued on August 16, 2010. This PRP timely follows.

Facts

This Court's direct appeal decision sets forth a comprehensive and excellent statement of the facts. Because that discussion is important to Pender's first claim of error, he repeats it verbatim below:

> Just before 7:00 pm, on May 14, 2007, Reed was walking to the work release center on Lakeridge Way in Olympia, when he noticed a tall man standing across the street, wearing a hood, and looking away from Reed. As Reed started to walk down a driveway leading to the work release center, he heard three gunshots, felt something hit him, and ran toward the work release center. As he ran, Reed glanced back and saw the man he had just seen across the street standing nearby, holding something out in front of him with both hands. After hopping a fence and running across a building's roof, Reed ran into the work release office; the staff called 911.
>
> Despite having been shot in the arm and the anterior chest, Reed survived. Surgeons recovered a .38 caliber bullet from Reed's back.[FN2] This type of bullet could have been fired from a .357 Magnum revolver.
>
> > FN2. Although the bullet struck Reed in the anterior chest, it failed to penetrate his chest and travelled around his chest between his skin and the muscle of his chest wall, coming to rest in his back.
>
> Later that same day, while still at the hospital, Reed spoke to Thurston County Sheriff's Office Detective David Haller. Reed initially identified the shooter as white or of a lighter-skinned race.[FN3]
>
> > FN3. Reed testified that he told Haller that the shooter was white or "[o]f a lighter gender." From the context of this statement, it is apparent that Reed was attempting to say that he told Haller that the shooter was light skinned or of a lighter-skinned race.

C. Eyewitnesses

1. Dr. Tate Viehweg

Meanwhile, sometime between 6:50 pm and 7:00 pm, on May 14, Army surgeon Dr. Tate Viehweg was driving southwest on Lakeridge Drive when he heard some gunshots and saw two men running: One man (Reed) ran across a parking lot toward the courthouse; the other man ran along a building and then turned onto Lakeridge Drive.

Viehweg made eye contact with the man who had turned onto Lakeridge Drive as the man ran past. The man was an African-American male in his early 20s, who was six feet to six foot two inches tall and weighed between 175 and 185 pounds. When Viehweg first saw him, the man was wearing a hooded sweatshirt. But, as he ran, the man removed the sweatshirt and tucked it under his arm; there appeared to be something in the sweatshirt's pocket. The man ran across the intersection into a parking lot located between two apartment buildings.

Deciding to follow the man, Viehweg watched him enter a gray four-door car bearing a license plate with the number 924-LYH. Viehweg followed the gray car for a while, but he lost sight of it when it started to go faster than Viehweg thought was safe. Viehweg then turned his car around, returned to where he had heard the gunshots, and contacted a law enforcement officer to report what he (Viehweg) had seen.

2. Lauri Nolan

Lauri Nolan lived in an apartment building across the street from where the shooting occurred. Shortly before 7:00 pm on May 14, she was on the telephone with a friend when she heard several gunshots and then saw a tall, black male with short braided hair and a black sweatshirt tucked under his right arm running up the driveway toward her apartment complex. She lost sight of the man after he ran "off the driveway."

Officers later showed Nolan two photomontages, each containing a different photograph of Pender. Nolan did not identify anyone in the first photomontage. After Nolan failed to select anyone from the first photomontage, Haller determined that Pender's hairstyle in the photograph in the first photomontage was significantly different

from his hairstyle on the night of the shooting. Haller then constructed the second photomontage using a photograph of Pender that Hamilton had taken on the night of the shooting. Nolan identified Pender in the second photomontage containing the more current photograph.

D. Stop of Pender's Car; Pender's Statement

Around 9:00 pm, on the night of the shooting, Pierce County officers located and stopped a gray Mercury Marquis with the license plate number 924-LYH. Pender, who was now dating Babbs, was driving the car. Officers later learned that Babbs was the car's registered owner.

Thurston County Sheriff's Detective Steve Hamilton had been investigating the Olympia shooting [FN4] when Pierce County officers contacted him and told him that they had located the shooter's car. Hamilton drove to Pierce County and, after advising Pender of his *Miranda*[FN5] rights, interviewed him. At the time of this interview, Pender's hair was braided in cornrows.

> FN4. Hamilton's supervisor had sent him to the crime scene at 8:00 pm. Hamilton characterized the situation when he arrived as "very hectic" and stated that he was not able to gather much information before leaving for Pierce County because the investigation had just started.
>
> FN5. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Pender told Hamilton that (1) he (Pender) had had the Mercury Marquis all day; (2) he had worked all day in Fife; and (3) when he left work, he had driven to his mother's house in Lakewood, where he spent several hours. He denied having been in Olympia that day.

Pender allowed officers to search the Mercury Marquis, but they did not find anything related to the shooting. Because Pender did not fit the vague witness descriptions that Hamilton had at that time [FN6] and because Hamilton did not find in the car any evidence related to the shooting, Hamilton took some photographs, obtained contact information, and released Pender.

> FN6. Pender did not fit the general description of the shooter

that two women, Annalisa Strago and Carrie Johnsons, had given to Hamilton. Strago and Johnson did not testify at either trial, and there is nothing in the record indicating how they had described the man they had seen at the time of the shooting. But it appears that Hamilton was aware that various witnesses had described the shooter as a "black male" and that he had some information about the man's skin tone.

E. Additional Investigation and Search

Detective Haller later learned from Pender's parents that Pender (1) was dating Babbs and sometimes stayed at her home; (2) frequently drove Babbs's car; (3) had a concealed weapons permit [FN7]; and (4) owned a .357 Magnum firearm. Officers obtained a search warrant for Babbs's residence. Executing the search warrant, they found Babbs's Mercury Marquis in the home's garage and a holster for a .357 firearm under the bed; they never located the firearm.

FN7. The permit was issued on March 13, 2007.

II. Procedure

The State charged Pender with one count of attempted first degree murder, with a firearm sentencing enhancement. Pender moved to suppress the evidence found during the search of Babbs's residence. The trial court denied the motion to suppress the holster.[FN8] The case went to a jury trial. Pender's first trial ended in a hung jury, and the trial court declared a mistrial.

FN8. Pender does not challenge this ruling on appeal.

A. First Trial

During the first trial, State's witness Brandon Franklin testified that at approximately 6:00 pm on May 14, 2007, he was on his way to the Olympia work release building to attend a class when he saw two young men, whom he believed to be Hispanic, sitting on some steps nearby. At some point after Franklin's class started, he and his classmates heard several gunshots. Franklin saw a man jump onto a nearby trailer and over a fence. Reed then appeared in the work release center and informed the officers present that he had been shot. Franklin later identified Pender from a photomontage as one of the men he (Franklin) had seen outside on the Olympia work release

steps that evening.

Defense witness Brianna Barker [FN9] testified that at 5:45 pm on the day of the shooting Pender had picked up a child from the Tacoma daycare center where she worked. In closing, defense counsel argued that Franklin's assertion-that he had seen Pender in Olympia around 6:00 pm on May 14-demonstrated that witness identifications could be flawed because Barker's testimony clearly established that Pender had been in Tacoma at 5:45 pm and, therefore, Franklin could not have seen Pender in Olympia at 6:00 pm.

> FN9. When Barker testified at the second trial, her last name was Jones. To avoid confusion, we refer to her as Barker throughout this opinion.

B. Second Trial
1. State's Evidence

The State did not call Franklin as a witness during the second trial. In addition to the facts set out above, the State's witnesses testified about (1) the identity and description of the person they had seen running from the shooting scene, (2) the photomontage process, and (3) how long it takes to drive from Tacoma to Olympia. Pender's former jail cellmate also testified that Pender had confessed to the shooting.

a. Identifications

Viehweg described the man he had seen running from the shooting scene, which general description Pender fit.[FN10] But neither party asked Viehweg whether the person he had seen running from the scene was in the courtroom during the trial. There was also no evidence that Viehweg had ever identified a photograph of Pender as the person he (Viehweg) had seen the night of the shooting.

> FN10. Haller testified that Pender was 23 at the time of the shooting and that Pender was about six feet tall and weighed about 175 pounds.

As noted above, Nolan identified Pender's photograph in the second of two photomontages that Haller showed her shortly after the shooting. Each montage was a single sheet containing photographs of six different men; Pender was the only one included in both

photomontages.

b. Timing

In anticipation of Barker's testimony, Haller testified that (1) it would have taken Pender five minutes to pick up a child at the Tacoma daycare and to take the child home; and (2) it generally takes about 35 minutes to travel from the child's home to the shooting location, depending on traffic. Haller did not testify about the specific traffic conditions around the time of the shooting.

c. Jailhouse confession

Norman Field [FN11] admitted that he had a substantial criminal history and that he had lied to the police on at least one occasion. He testified that while sharing a jail cell with Pender, Pender had said that "he [Pender] had shot an individual that was here in the work release for his girlfriend." Ex. 63 at 154-56. Field testified that Pender said he had shot the individual at his (Pender's) girlfriend's request because he loved her.

> FN11. Field testified at the first trial, but he was unavailable to testify at the second trial. The trial court allowed the parties to read Field's prior testimony into the record with certain redactions.

2. Defense Evidence

Pender's defense was that he was not in Olympia when the shooting occurred and that the witnesses who identified him were mistaken. To support this defense, Pender presented, (1) Barker's testimony; (2) Alisha Butler's and Jodi Lorenz's testimony indicating that they had seen a Caucasian or Hispanic man running from the shooting scene; [FN12] and (3) expert testimony regarding the fallibility of expert witness testimony and the risk of misidentification when the identification process used involves the type of photomontage procedures used in this case.

> FN12. In its response, the State asserts that the record shows that when Butler and Lorenz saw the running man they were not in the same place Viehweg was when he saw the man who ran past his car and, therefore, Butler and Lorenz did not

> see the same person Viehweg saw. Because the parties have not submitted any trial exhibits that would shed light on where Butler and Lorenz were in relation to where the shooting occurred, we cannot determine whether the State's characterization of the record is correct.
>
> a. Admissibility of Franklin's testimony
>
> On the second day of trial, the State asked the trial court to preclude Pender from presenting both Franklin's and Barker's testimonies. The State asserted that Pender had indicated in opening statement [FN13] that he intended to call (1) Franklin to testify that he had seen Pender in Olympia at 6:00 pm on the day of the shooting; and (2) Barker to testify that Pender was in Tacoma at 5:45 pm picking up a child from daycare, which demonstrated that Pender could not have possibly been in Olympia at 6:00 pm. The State argued that (1) Pender was improperly "calling a witness merely to impeach that witness's testimony," and that the proposed "evidence [was] immaterial and irrelevant." Report of Proceedings (7/1/2008) at 87.
>
> FN13. The opening statements are not part of the record on appeal. *See* RAP 9.2(b).
>
> Defense counsel argued that Pender was not trying to introduce impeachment testimony but, rather, to demonstrate that eyewitness identification was not necessarily accurate. But the trial court agreed with the State that Pender was attempting to "set up a dichotomy in [his] own case," and ruled that, under *Hancock,* Pender could not present both Barker's and Franklin's testimony. Pender then elected to call Barker as a witness instead of Franklin.

Defense Counsel's Offer of Proof

Pender's counsel at his second trial made an offer of proof in support of Franklin's testimony. Counsel, Mr. Lane, has submitted a sworn statement regarding his efforts to admit that testimony: "I sought to admit Mr. Franklin's testimony because I thought it helped Mr. Pender's case. Pender's defense was that he was not in Olympia when the shooting

occurred and that the witnesses who identified him were mistaken." See *Declaration of Lane* attached as Appendix B. Mr. Lane's declaration continues:

> I was not seeking to admit Mr. Franklin's testimony only for the limited purpose of impeaching the eyewitness testimony of other witnesses. Instead, I wanted to call Mr. Franklin because I believed his testimony created a reasonable doubt about the time of the shooting and whether Mr. Pender was the shooter. Therefore, I did not have any strategy reason to limit my offer of proof. Put another way, if my offer of proof was insufficient to admit Mr. Franklin's testimony it was not because I did not want the testimony admitted for purposes other than judging the reliability of the eyewitness identifications.

Declaration of Lane at § 9.

Pender Was Required to Wear a Shock Device During Trial

During his entire trial, Pender was forced by courtroom security to wear a shock device around his mid-section and under the upper portion of his pants. Mr. Pender has submitted a declaration that sets for the material facts. See *Declaration of Pender* attached as Appendix C. Prior to trial, Thurston County Corrections personnel required Pender to sign a form that informed him that if he did not sit and act a certain way during his trial, a jolt of electricity would shock him. The shock device, which is called the "Bandit," delivers a sudden and disabling shock upon certain movements. Courtroom security put the shock device on Pender solely due to the charge against him. While incarcerated, Pender did not have infractions while in jail and had not acted inappropriately in court.

Because he was intensely afraid of being shocked, Pender did not freely talk with his attorney during his trial. He was afraid to move. Pender thought about this device nearly every moment of his trial. At the end of each day of trial, he had red marks on his skin. However, the physical discomfort was nothing compared to the psychological threat imposed by the device.

Although the device was worn under his pants, the outline could be seen through his pants as a bulky square box. Pender was sitting approximately 10 to 15 feet from the jury. Although the box was probably not visible while Pender was sitting, each time that he stood up, an outline device could be seen. Pender stood for either the jury or the judge approximately 8 times each day for three days.

Special Verdict Form

The Information alleged that Mr. Pender committed that crime while "armed with a deadly weapon," specifically (to wit") "a firearm." No other weapon was alleged.

The special verdict form asked only if Pender was "armed with a firearm." The jury answered: "Yes."

The trial court later imposed a sentence that included a term consistent with a firearm enhancement.

C. ARGUMENT

1. Mr. Pender Was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Made an Insufficient Offer of Proof.

Brandon Franklin testified for the State in the first trial. The State excluded Mr. Franklin during the second trial. Pender's first jury hung. His second jury convicted him. Pender's counsel made a limited offer of proof in support of Franklin's testimony. On direct appeal, this Court found that counsel had failed to make an adequate offer of proof in support of Franklin's testimony. Now, counsel admits that he had no good reason to make only the limited offer of proof. Counsel was not seeking to admit Franklin's testimony only for a limited purpose. Counsel wanted Franklin to testify because Franklin's testimony created a reasonable doubt. This Court should reverse because counsel's deficient offer of proof resulted in the exclusion of exculpatory evidence.

This court held on direct appeal that "the trial court erred when it refused to allow him to present admissible evidence in his defense." *Opinion,* p. 1. This court's opinion further noted that the exclusion of exculpatory evidence implicates the Constitution. However, the court concluded that Mr. Pender was not entitled to relief because counsel failed to make an adequate offer of proof.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his

defence." The Supreme Court's "decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the defendant's fundamental right to a fair trial.' " *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)).

Strickland establishes the benchmark by which a claim of ineffective assistance of counsel must be evaluated. First, the petitioner must show that his counsel's performance was deficient. Second, he must show that the deficient performance prejudiced him by denying him a fair trial. To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Mr. Pender had a right to present evidence that contradicted the State's proof.

The Compulsory Process Clause guarantees a defendant the right to offer the testimony of favorable witnesses and compel their attendance at trial. *See also* Wash. Const. Art. I, sec. 22. The right was held applicable to the states in *Washington v. Texas,* 388 U.S. 14, 19 (1967).

In *State v. Maupin,* 128 Wash.2d 918, 913 P.2d 808 (1996), this Court explained the importance of the right. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in

plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *See also Washington,* 388 U.S. at 19, *cited with approval by State v. Smith,* 101 Wash.2d 36, 41, 677 P.2d 100 (1984). "The guaranty of compulsory process is a fundamental right and one which the courts should safeguard with meticulous care." *Id.*

In *Maupin,* the erroneously excluded evidence also contradicted the State's proof:

> .....Brittain would have testified he saw the kidnapped girl with someone other than the defendant after the time of kidnapping. Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, it at least would have brought into question the State's version of the events of the kidnapping.

Maupin, 128 Wash.2d at 928.

In this case, Franklin's testimony contradicted other witnesses on the crucial point for the defense. *See Taylor v. Illinois,* 484 U.S. 400, 410 (1988) (discussing the right to present evidence which contradicts the State's case).

Further, the issue is not whether the shooting took place at 6 p.m. or 7 p.m. Indeed, Franklin's testimony does not set the time of the shooting exactly at 6 p.m. Instead, the issue is whether there is some reason to conclude that the shooting occurred closer to 6 p.m.—when Pender would have still been driving on route from the Tacoma daycare center. In other words, did the testimony provide any support to the defense theory? The answer is clearly, "yes."

Nevertheless, the State argued below that because Mr. Franklin's testimony would have supported in part, but also contradicted in part, the defense theory, it was properly excluded. This is really no different than the theory advanced by the trial court for excluding Mr. Franklin's testimony—a theory that this Court rejected. Further, not only did the State fail to provide any legal support for that theory, it is a theory that defies reality.

Witnesses are not cleanly and neatly divided into two camps: prosecution and defense. Instead, witnesses often testify to facts which support the State in some respects and the defense in other respects. The fact that a witness may lend some support to both sides does not make that witness's testimony irrelevant. Instead, the test is much simpler: does the witness have first-hand (as opposed to hearsay) information about a material fact. Franklin certainly passed that test.

Jurors were not presented with an all or nothing choice—having to pick only between a shooting at 6 p.m. or at 7 p.m. Instead, the closer the shots were to 6 p.m., the less likely that Pender was the shooter. Likewise, if jurors concluded the shots were closer to 7 p.m., that conclusion would have lent support to the State's case.

Jurors evaluate the State's proof and the defense evidence as a whole. While jurors may reject a witness's testimony as entirely credible or incredible, they may also find some portions credible, and some not.

Just as importantly, the State must prove its case beyond a reasonable doubt. Based on that standard of proof, a defense theory seeks to expose as many doubts about the State's proof as possible. The defense closing during the first trial illustrates this point. During closing argument at the first trial, the defense attorney argued:

> But here is the important part with Mr. Franklin: He said he got back at 6 o'clock. Check your notes.....
>
> Now, he says he saw Jerome at 6 o'clock that night on the stairs. Now, the State wants to create the impression that there he is, Jerome lying in wait for Marcus Reed to return, premeditated, lying in wait going to gun him down, and proof of that is Mr. Franklin, who sees him there at 6 o'clock.
>
> The problem with that is he wasn't there at 6 o'clock. He was picking up the child at 5:45 in Tacoma. It is, at least by Det. Haller's measurement, a 45 minute drive. It is at least—yeah, I'm sorry. I think he said 40 minutes.....
>
> ****
>
> .....Jerome was not there at 6 o'clock on those steps, despite the fact that he was identified as being there from the montage....

> ****
> .....Even if you were to believe that he was in Olympia that day at some time, that does not prove he was the shooter.

2007 RP 332-34.

There is an additional relevance to Franklin's testimony, which this court noted in footnote 18 of its *Opinion*—that the eyewitnesses, including Franklin, mistook Pender for the shooter. Because the defense was obviously challenging Pender's identification (and called Dr. Loftus in support), it should have been obvious to the trial court that the evidence was admissible on these grounds.

Because trial counsel had no good reason—in law or fact—not to make an adequate offer of proof and because the evidence made the difference in Pender's first trial, this Court should either reverse and remand for a new trial or remand this case to the trial court for a hearing pursuant to RAP 16.11.

2. Pender Was Denied His Right to Due Process, A Fair Trial, To Be Present, To Counsel, and To Confront When He Was Forced to Wear a Shock Device at Trial—a Device that Had a Profound Psychological Impact on Him—Without any Showing of a Security Need.

   Pender Was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Failed to Object to the Stun Belt that Pender Was Forced to Wear.

The Supreme Court has recognized that the use of physical restraints is an "inherently prejudicial practice" which raises a number of

constitutional concerns. *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986). The use of physical restraints, such as shackles or a stun belt, during trial and the sentencing phase implicates a defendant's Fifth and Fourteenth Amendment rights to due process. *Deck v. Missouri*, 544 U.S. 622, 628-29 (2005).

Shackles are prejudicial when viewed by jurors. Shock devices are prejudicial because of the psychological effect the device has on the person forced to wear it. As a result, courts have recognized an additional prejudice—even where the shock device is not noticeable to the jury. Even a restraint that is less severe than a stun belt, like shackles, can interfere with the accused's Sixth Amendment "ability to communicate" with his lawyer. *Illinois v. Allen*, 397 U.S. 337, 343-4 (1970). Whenever a court is considering restraints of any kind, it must impose only the least restrictive security measure. *Id.*

Forcing Mr. Pender to wear a stun belt was the most restrictive security measure possible – not the least.

A stun belt is an electronic device that is secured around a prisoner's waist. When activated, intentionally or otherwise, the belt delivers a "50,000-volt, three or four milliampere shock lasting eight seconds." *Hawkins v. Comparet-Cassani,* 251 F.3d 1230, 1241 (9th Cir. 2001). The shock administered "causes incapacitation in the first few seconds and severe pain during the entire period," may also cause "immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal."

Hawkins, 251 F.3d at 1234 and *People v. Mar*, 28 Cal.4th 1201, 1214, 52 P.3d 95 (2002) (internal citation and quotation marks omitted)). The wearer generally is knocked to the ground by the shock and convulses uncontrollably. *Mar*, 28 Cal.4th at 1215. Activation of a shock belt can cause muscular weakness for approximately thirty to forty-five minutes as well as heartbeat irregularities or seizures. *Mar*, 28 Cal.4th at 1214. "Accidental activations are not unknown." *United States v. Durham*, 219 F.Supp.2d 1234, 1239 (N.D.Fla.2002); *aff'd* 287 F.3d 1297 (11th Cir. 2002) (reporting a survey that showed 11 out of 45 total activations, or 24.4%, were accidental).

Security personnel make sure that defendants forced to wear a shock device are aware of the above. Indeed, the omnipresent threat of shock is essential to the effectiveness of the device.

Mr. Pender was prejudiced in several ways as a result of being forced to wear the shock device during trial.

Mr. Pender's fear of the shock device interfered with several of his important trial rights. Many courts have recognized the psychological impact that a stun belt has on a defendant. In fact, stun belt manufacturers tout the psychological "supremacy" of the device. However, while the threat of intense, debilitating pain may make it an effective security device, it also serves to interfere with several critical trial rights. For example, in *Durham*, 287 F.3d 1297 (11th Cir. 2002), the court stated:

> A stun belt seemingly poses a far more substantial risk of interfering with a defendant's Sixth Amendment right to

> confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial-including those movements necessary for effective communication with counsel.

Id.

The Eleventh Circuit also held that a stun belt has a negative impact on a defendant's Sixth Amendment and due process rights to be present at trial and to participate fully in his defense:

> Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may 'significantly affect the trial strategy [the defendant] chooses to follow.' A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.

Id. at 1306.

In *Durham*, the court held that defendant's right to be present at trial and to participate in his own defense was affected by a stun belt, and thus, reversal was required because the prosecution did not prove that the error was harmless. *Id.* at 1309. *See also People v. Mar*, 28 Cal.4th 1201 (Cal. 2002) (holding that trial court erred in compelling defendant to wear a stun belt).

Similarly in *Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003), the Ninth Circuit held that the trial court erroneously required the defendant to wear a stun belt, and remanded the case to decide whether the defendant was prejudiced in being forced to wear such a device. The court recognized the fear and anxiety that wearing a stun belt can have on a defendant: This "increase in anxiety" may impact a defendant's demeanor on the stand; this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant's 'privilege of becoming a competent witness and testifying in his own behalf. *Id.* at 901 (citations omitted).

All of these constitutional concerns were fully realized in this case. Requiring Mr. Pender to wear a stun belt during trial interfered with his willingness to consult with counsel. Pender notes that he was afraid to consult with his attorney during the testimony of witnesses. It is important to note that unjustified interference with the right to counsel constitutes a structural error. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) ("We have little trouble concluding that the erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error"'") (citations omitted). Thus, this type of prejudice alone justifies reversal.

However, the prejudice to Mr. Pender does not end there. Requiring Mr. Pender to wear a stun belt made him appear to be cold and emotionless, the strategy he reasonably adopted in order to lessen the chance of being shocked. However, while an effective strategy to avoid getting shocked, it was also a strategy that likely negatively colored jurors' views of Pender in making their determination. Wouldn't an innocent man show some sense of outrage or at least protest? Thus, the use of the shock device could have contributed to Mr. Pender's conviction.

Trial counsel deficiently failed to provide adequate assistance of counsel by not objecting to the shock device—even if it was not visible to jurors. *Strickland v. Washington,* 466 U.S. 668, 692-94 (1984). It is obvious that the use of the shock device was unjustified. Pender did not present any security risks. He had not acted out in court. The only justification for the device offered by jail personnel was Pender's charge—a justification that has been rejected by the courts.

However, to the extent that there was some justification for some heightened courtroom security, the court would have been required to consider less restrictive alternatives to the stun belt – alternatives that could have provided the necessary security without psychologically disabling Pender's ability to represent himself. The *Durham* court noted some of the procedural steps necessary in order to permit the use of a stun belt – steps that were not taken during Mr. Pender's trial. In addition to factual findings

regarding the functioning of the belt and the possibility of accidental discharge, the Eleventh Circuit pointed out that a "court will also need to assess whether an essential state interest is served by compelling a particular defendant to wear such a device, and must consider less restrictive methods of restraint." 287 F.3d at 1306-07. Additionally, a "court's rationale must be placed on the record to enable [an appeals court] to determine if the use of the stun belt was an abuse of the court's discretion." *Id.* at 1307 (*citing United States v. Theriault*, 531 F.2d 281, ___ (5th Cir. 1976)). Here, a leg brace without the shock device could have served the same security purpose without any of the corresponding negative psychological effects.

Mr. Pender should not have been required to wear a shock device. If counsel had brought an appropriate motion, it would have been clear that use of the shock device was constitutionally prohibited. Pender was prejudiced in a variety of ways by being forced to wear the device. This court should either reverse or remand this claim to the trial court for an evidentiary hearing. RAP 16.11.

3. THE STATE CHARGED PENDER WITH A DEADLY WEAPON ENHANCEMENT, BUT HE WAS SENTENCED FOR A FIREARM.

It is elemental that a defendant can only be convicted of the crime charged. *State v. Van Gerpen,* 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995). Our cases require the State to include in the charging documents

the essential elements of the crime alleged. *City of Auburn v. Brooke*, 119 Wash.2d 623, 627, 836 P.2d 212 (1992). The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). This rule applies with equal force to sentencing enhancements, such as deadly weapons or firearms.

Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. *In re Pers. Restraint of Bush*, 95 Wash.2d 551, 554, 627 P.2d 953 (1981). When the term "sentence enhancement" describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.

In *State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008), the Washington Supreme Court reviewed the charging document in that case and concluded that Recuenco had only been charged with a deadly weapon enhancement—not a firearm. ("Recuenco was charged with assault with a deadly weapon enhancement.....but he was erroneously sentenced with a firearm enhancement."). Further, it did not matter that some of the jury instructions described a firearm. "(O)nce the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision." 163 Wn.2d at 435.

The charging document in Recuenco, which charged only a deadly weapon, did not differ in any material way, shape, or form, from the changing document in this case.

Recuenco was charged with assault with "a deadly weapon, to wit: a handgun." The charging document cited to former RCW 9.94A.125 and .310.

Pender's charging document is virtually identical to Recuenco's. The charging document in the instant case alleged that Pender was armed with a deadly weapon, "to wit: a firearm," and cited RCW 9.94A.533(3) and 9A.28.020.

If Recuenco was charged only with a deadly weapon, so was Pender.

In *Recuenco*, the Washington Supreme Court further held:

> We conclude it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply. Therefore, we vacate the firearm sentence and remand for correction of the sentence.

Id. at 442. Although the Court discussed the jury instructions, the Court's opinion could have just as easily rested on the fact that Recuenco was charged in the Information only with the deadly weapon enhancement.

The same result must follow in this case. This Court should remand with instructions by the trial court to vacate the uncharged firearm enhancement.

However, it would be improper to simply impose a deadly weapon enhancement. In *Pers. Restraint Petition of Cruze*, __ Wn.2d __, __ P.3d. ___ (August 12, 2010), the Washington Supreme Court rejected Cruze's claim that he was convicted of a "firearm" enhancement which was legally separate and distinct from a "deadly weapon" enhancement.

Instead, the opinion held that the "Hard Time for Armed Crime Act" ("The HTACA"), took what was formerly a single sentence enhancement for offenders armed with a deadly weapon and replaced it with two sentence enhancements: one for offenders armed with a firearm and one for offenders armed with a "deadly weapon as defined by this chapter *other than a firearm*." The Court noted that "whereas the former 'deadly weapon' sentence enhancement provided for up to two additional years of imprisonment regardless of the deadly weapon used, the new scheme authorized up to five years for those armed with firearms and up to two years for those armed with a deadly weapon *other than a firearm*."

Put another way, the Court held that the HTACA amendments do not distinguish between enhancements for use of a "firearm" and for use of a "deadly weapon"; they distinguish between enhancements for use of a "firearm" and for use of a "deadly weapon *other than* a firearm." (emphasis in the opinion).

If the fact that a firearm could not support a deadly weapon enhancement was not clear enough from the above-cited language, the

Court additionally held that the inclusion of the "other than a firearm" language "makes it clear that the HTACA treats firearm enhancements, per former RCW 9.94A.310(3), *and deadly-weapon-other-than-firearm enhancements*, per former RCW 9.94A.310(4), as two subsets of the larger category of deadly weapon enhancements." (emphasis supplied).

The *Cruze* court makes it clear that a "deadly weapon" enhancement is broken into two mutually exclusive sub-parts: firearms and deadly weapons other than firearms. As a result, Pender cannot be convicted for a "deadly weapon" enhancement based on the use of a firearm—the only weapon alleged in this case.

D. CONCLUSION

Based on the above, this Court should either reverse and remand this case for a new trial or should remand for an evidentiary hearing.

DATED this 2nd day of August, 2011.

Respectfully Submitted:

/s/ Jeffrey E. Ellis
Jeffrey E. Ellis #17139
B. Renee Alsept # 20400
Attorneys for Mr. Pender
Law Office of Alsept & Ellis
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Portland, OR 97205
JeffreyErwinEllis@gmail.com
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Appendix A

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

'08 JUL 17 A9:39

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,	
vs.	No. 07-1-00886-5
JEROME CLINTON PENDER, Defendant.	**FELONY JUDGMENT AND SENTENCE (FJS)**
SID: If no SID, use DOB: 03/11/1984 PCN: 766918719 BOOKING NO. C01444475	Prison (non-sex offense)

I. HEARING

1.1 A sentencing hearing was held on 7-17-08 and the defendant, the defendant's lawyer and the deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on JULY 3, 2008 by [ ] plea [X] jury-verdict [ ] bench trial of

COUNT	CRIME	RCW	DATE OF CRIME
I	ATTEMPTED MURDER IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.32.030(1)(a) 9.94A.602; 9.94A.533(3) 9A.28.020	MAY 14, 2007

as charged in the ORIGINAL information.

[ ] Additional current offenses are attached in Appendix 2.1.

[ ] The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

[X] A special verdict/finding for use of firearm was returned on Count(s) I. RCW 9.94A.602, 9.94A.533.

[ ] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) _____. RCW 9.94A.602, 9.94A.533.

[ ] A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on

COPY TO SHERIFF

COPY TO DOC

0-000000110

Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

[ ] The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s) _____ involve(s) domestic violence.

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

None of the current offenses constitute same criminal conduct except: _____

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	N/A					
2						
3						
4						
5						

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

None of the prior convictions constitutes same criminal conduct except _____

2.3 SENTENCING DATA:

COUNT	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
I	0	XV	180-240 mos.	60 (F)	240-300 mos.	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present. [ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:
[ ] within [ ] below the standard range for Count(s) _____.
[ ] above the standard range for Count(s) _____.
[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.
Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts

_____.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

$ RESERVED Restitution to: _____

RTN/RJN

$_____ Restitution to: _____

$_____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV $ 500.00 Victim assessment RCW 7.68.035

0-000000112

	$_____	Domestic Violence assessment	RCW 10.99.080
CRC	$ 200.00	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $_____ FRC	
		Witness costs $_____ WFR	
		Sheriff service fees $_____ SFR/SFS/SFW/WRF	
		Jury demand fee $_____ JFR	
		Extradition costs $_____ EXT	
		Other $_____	
PUB	$ 1,500.00	Fees for court appointed attorney	RCW 9.94A.760
WFR	$_____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$_____	Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement fund of Thurston County	RCW 9.94A.760
	$_____	Thurston County Drug Court Fee	
CLF	$_____	Crime lab fee [ ] suspended due to indigency	RCW 43.43.690
	$ 100.00	Felony DNA collection fee [ ] not imposed due to hardship	RCW 43.43.7541
RTN/RJN	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$_____	Other costs for:_____	
	$_____	TOTAL	RCW 9.94A.760

The above total may not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing may be set by the prosecutor or is scheduled for _____.

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

RJN	NAME of other defendant	CAUSE NUMBER	(Victim's name)	(Amount-$)

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

[X] In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of $50.00 per day, unless another rate is specified here:

0-000000113

(*JLR*) RCW 9.94A.760.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 The defendant shall not have contact with MARCUS REED (10-7-84) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed with this Judgment and Sentence.

4.4 OTHER:

0-000000114

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

*240 months on Count I _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

Actual number of months of total confinement ordered is: 240 MOS.*
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.) *INCLUDES CONSECUTIVE 60 MO. FIREARM ENHANCEMENT.

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

NON-FELONY COUNTS:

Sentence on counts _____ is/are suspended for _____ months on the condition that the defendant comply with all requirements outlined in the supervision section of this sentence.

_____ days of jail are suspended on Count _____
_____ days of jail are suspended on Count _____

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____.

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

_____.

The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____.

4.6 ~~[ ]~~ **COMMUNITY CUSTODY** is ordered as follows:

Count I for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant commited a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

Pay all court-ordered legal financial obligations

Report as directed to a community corrections officer

Notify the community corrections officer in advance of any change in defendant's address or employment

Remain within prescribed geographical boundaries to be set by CCO

[ ] The defendant shall not consume any alcohol and shall submit to random breath testing as directed by DOC for purposes of monitoring compliance with this condition.

X Defendant shall have no contact with: MARCUS REED

[ ] The defendant shall undergo evaluation and fully comply with all recommended treatment for the following:

[ ] Substance Abuse [ ] Mental Health

[ ] Sexual Deviancy [ ] Anger Management

[ ] Other: _____

[ ] The defendant shall enter into and complete a certified domestic violence program as required by DOC or as follows:

_____

[ ] The defendant shall not use, possess, manufacture or deliver controlled substances without a valid prescription, not associate with those who use, sell, possess, or manufacture controlled substances and submit to random urinalysis at the direction of his/her CCO to monitor compliance with this condition.

[ ] The defendant shall comply with the following additional crime-related prohibitions: _____

_____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:_____

_____.

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court *shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment* of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing (sign initials):_____.

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 [X] The court finds that Count I is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.8 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.9 OTHER: Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

DONE in Open Court and in the presence of the defendant this date: July 17, 2008.

Judge/Print name: Christine A. Pomeroy

Deputy Prosecuting Attorney
WSBA No. 16786
Print name: JOHN M. "JACK" JONES

Attorney for Defendant
WSBA No. 25022
Print name: CHARLES W. LANE

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: X Jerome Pender.

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. (If no SID take fingerprint card for State Patrol) Date of Birth 03/11/1984

FBI No. Local ID No. _____

PCN No. 766918719 Other _____

Alias name, DOB: _____

Race:			Ethnicity:	Sex:
[ ] Asian/Pacific Islander	[X] Black/African-American	[ ] Caucasian	[ ] Hispanic	[X] Male
[ ] Native American	[ ] Other: _____		[X] Non-Hispanic	[ ] Female

FINGERPRINTS: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: 7-17-08

DEFENDANT'S SIGNATURE: X Jerome Pender

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON

Plaintiff,

vs.

JEROME CLINTON PENDER,

Defendant.

NO. 07-1-00886-5

WARRANT OF COMMITMENT ATTACHMENT TO JUDGMENT AND SENTENCE (PRISON)

DOB: 03/11/1984
SID: FBI:
PCN: 766918719
RACE: B
SEX: M
BOOKING NO: C01444475

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections.

The defendant JEROME CLINTON PENDER has been convicted in the Superior Court of the State of Washington for the crime(s) of:

ATTEMPTED MURDER IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM

and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By direction of the Honorable:

Christine A. Pomeroy

BETTY J. GOULD
CLERK

By: Denise Metz
DEPUTY CLERK

Appendix B

DECLARATION OF CHARLES WILLIAM LANE IV

I, Charles Lane, declare:

1. I am a lawyer. I was admitted to the Washington State Bar in 1995.

2. During my career, I have [[.

3. I represented Jerome Pender at his second attempted murder trial in Pierce County Superior Court. The first trial resulted in a mistrial due to a hung jury. I was appointed to represent Mr. Pender for the retrial.

4. At trial, I sought to admit the testimony of Brandon Franklin, who testified at the first trial that at approximately 6:00 pm on May 14, 2007, he was on his way back to the Olympia work release building when he saw two young men, whom he believed to be Hispanic, sitting on some steps nearby. As he was approaching the work release facility he heard several gunshots. Franklin said he saw a man jump onto a nearby trailer and over a fence. The victim then appeared in the work release center and informed the officers present that he had been shot. Franklin later identified Pender from a photomontage as one of the men he (Franklin) had seen outside on the Olympia work release steps that evening.

5. I sought to admit Mr. Franklin's testimony because I thought it helped Mr. Pender's case. Pender's defense was that he was not in Olympia when the shooting occurred and that the witnesses who identified him were mistaken.

6. The State moved to exclude Mr. Franklin's testimony, despite the fact that the State had called him during the first trial. The State argued that because the defense intended to call a witness (Brianna Barker) to testify that Mr. Pender was in Tacoma at 5:45 pm picking up a child from daycare, Pender could not have possibly been in Olympia at 6:00 pm. The State argued that we were calling a witness only for purposes of impeachment.

7. In response, I argued that I was attempting to demonstrate that eyewitness identification was not necessarily accurate.

8. The trial court ruled that the defense was attempting to set up a

dichotomy in Pender's own case, and ruled that, I could not present both Barker's and Franklin's testimony. I then elected to call Barker as a witness instead of Franklin.

9. I was not seeking to admit Mr. Franklin's testimony only for the limited purpose of impeaching the eyewitness testimony of other witnesses. Instead, I wanted to call Mr. Franklin because I believed his testimony created a reasonable doubt about the time of the shooting and whether Mr. Pender was the shooter. Therefore, I did not have any strategy reason to limit my offer of proof. Put another way, if my offer of proof was insufficient to admit Mr. Franklin's testimony it was not because I did not want the testimony admitted for purposes other than judging the reliability of the eyewitness identifications.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

Date and Place

Charles Lane

Appendix C

DECLARATION OF JEROME PENDER

I, Jerome Pender, declare:

1. I am the petitioner in this Personal Restraint Petition.

2. In 2008 when I was in trial for my case, I was placed into a leg brace on my right side and had a taser box put on my upper left thigh at my mid section for every day that I was in trial. There were also two jail guards who sat in my court room during the whole trial. One guard sat by the door and the other guard sat behind me to make sure I didn't move too much.

3. I have not received any infractions while in custody and at the time the device was put on me I had caused no trouble to the staff. I was always good in court also.

4. The taser that was placed on me was called the "Bandit" and it consisted of a belt that went around me at my left thigh with a box attached to the front between my thigh and my knee. The box was about 3 inches deep, 3 inches wide and 3 inches high. It was bulky and showed under the top part of my pants.

5. Before the box was originally placed on me, the officers in the jail had me sign a form acknowledging that I knew that a warning would beep and then 50,000 jolts of electricity would be put into my body if I did anything wrong. I did everything that the jail officers asked me to do.

6. I recall that I told my attorneys about these, but he told me he couldn't do anything about it because it was jail policy. My attorney did not object to these items being placed on me.

7. Although these items could not be seen while I was sitting down, the taser box could be seen at that top of my pants when I stood up because it was so bulky. I recall standing for the judge and the jury numerous times throughout each day of trial. I was sitting about 10 to 15 feet from the jury.

8. If the jury had looked at me, they would have seen the bulging box under the upper part of my pants. I am almost certain that some of the jurors

looked at me during the trial some times when I was standing as they walked back into the court room after breaks. I also think that they looked at me when I stood for the judge a few times. I really don't think that the jurors could have seen the leg brace though.

9. While my trial was happening I hardly ever moved because I was afraid the device would go off. A couple of times I would sit with my hands resting on my lap and the jail officer that was sitting right behind me would come up and whisper in my ear, "put your hands above the table." I always responded immediately to his request because I was so afraid the shock device would go off. I never meant to disobey him when I put my hands in my lap, I was just tired and it was very awkward to sit with both the taser belt and the leg brace tightly attached to my body. The only reason I would forget and move my hands to my lap is because the taser belt did not pull as tight when my arms were down.

10 I recall that the guard came up to me about three times during my first trial and two times during my second trial. I do know that I was better at sitting still during my second trial because I was learning how to sit with the discomfort a little better.

10. At the end of each day of trial, I had red marks from having these devices tightly attached to my body. The taser box was very uncomfortable and it was wrapped very tightly around my thigh. It was on my left leg and went from above my left knee up to my thigh area. It took several months for the marks to go away after the trial.

11. The thing I remember most about my trials was sitting very still, afraid to move. I was worried every single minute that I was in trial that the device would go off. I remember wanting to lean over and tell my attorney that certain things were not true, but I was afraid to move. For instance, a witness testified that he was my cellmate. I wanted to tell my attorney that I never shared a cell with that guy, but I was afraid to lean over and tell my attorney. So, I sat still, showed no emotion (even when I was upset with the testimony that was untrue), and hardly ever talked to my attorney because I did not want to get shocked.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.

Jerome Pender

Jerome Pender

7/7/11

Date: Place

VERIFICATION OF PETITION

I, Jerome Clinton Pender, verify under penalty of perjury that the attached *Personal Restraint Petition* is true and correct and has been filed on my behalf.

DATED this 6 day of July, 2011.

Jerome Pender

Jerome C. Pender

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